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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 293

JAKE SHERMAN and JENNIE SHERMAN,
Co-partners, trading under the firm name of
Livernois Auto Parts,
Petitioners,
v.
GOERLICH'S, INC.,
an Ohio corporation, and
IRVING GRAND,
an individual doing business as Grand Sales Company,
jointly, severally and individually,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 9, 1965.

CITATION TO OPINION BELOW

The opinion of the Circuit Court of Appeals is reported in 341 F. 2d 988.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 9, 1965. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the federal statute of limitations has properly caused dismissal of Petitioners' Complaint and Amended Complaint charging violations of the Sherman Act, Secs. 1 and 2, filed on April 26, 1960 and June 3, 1963 respectively, supported by deposition and affidavit, alleging the commission of overt acts causing damage in the year 1957.

STATUTE INVOLVED

The statutory provision involved is 15 U.S.C. Sec. 15 (b), printed in the Appendix.

STATEMENT

Petitioners through their Complaint and Amended Complaint, R. 3a and 20a, have charged Respondents with violations of the Sherman Act by (1) conspiring to refuse to accept Petitioners' orders for Respondent Goerlich's Inc., motor vehicle exhaust systems, and (2) conspiring to deprive Petitioners from purchasing such motor vehicle exhaust systems from other wholesalers. Petitioners claim damage to their business from both alleged violations.

The trial court in its opinion, R. 27a, granting Respondents' motion for summary judgment, stated, "* * * that a civil treble damage case under the anti-trust laws accrues at the time of, and the statute of limitations begins to run from, the commission of the overt act alleged to have caused damage to the plaintiffs. Here it was the cut-off of supplies in 1955. A Complaint filed in 1960, amended in 1963 comes too late".

The court below affirmed the judgment of dismissal on the merits.

REASONS FOR GRANTING THE WRIT

1. Although this Court, for many years, had established the rule that a civil action for conspiracy will lie only when an overt act has been committed which has damaged the plaintiff;[1] there is considerable conflict among the lower federal courts in applying the federal antitrust statute of limitations in private treble damage suits.

Some courts have found the statute to run from the date of the commission of the first overt act causing damage;[2] others have utilized a multiple cause of action theory holding that upon the commission of each overt act the statute commences to run.[3]

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[1] *Nalle v. Oyster*, 230 U. S. 165, 182 (1913).

[2] *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (SD. N.Y. 1961); *Momand v. Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), c.d. 336 U.S. 967, r.d., 337 U.S. 934 (1949); *Rutkin v. Reinfeld*, 229 F. 2d 248 (2d Cir. 1955); *Baldwin v. Loew's Inc. et al.*, 312 F. 2d 387 (7th Cir. 1963).

[3] *Steiner v. 20th Century-Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Crummer v. duPont*, 223 F. 2d 238 (5th Cir.), c.d. 350 U.S. 848 (1955); *Park-In Theatres v. Paramount-Richards Theatres*, 185 F. 2d 407 (3d Cir.) c.d. 341 U.S. 950 (1950).

Somewhat akin to the multiple cause of action theory had been the application used in the Sixth Circuit[4] until the affirmation of the court below of the opinion of the trial court R. 24a. The Sixth Circuit had held unequivocally "* * * that a right of action for a civil conspiracy under the antitrust laws accrues from the commission of the last overt act causing injury or damage."[5]

2. Although this case does not present a question of great economic impact on a national scale, it is submitted that, Petitioners despite their modest role in trade and commerce, are members of the public who are to receive the protection of the Sherman Act. See *Klor's, Inc. v. Broadway-Hale Stores, Inc. et al.*, 359 U.S. 207.

Furthermore, with the continuously increasing number of private treble damage actions sanctioned by the Sherman Act adding to our jurisprudence, a clear mandate from this Court, on a seemingly uncomplicated rule of law, i.e. when does the statute of limitations begin to run in these cases, should be provided to the lower courts.

Until this Court, for the first time, speaks affirmatively on this subject private litigants will continue to be subjected to the conflicting, confusing and sometimes unexplainable rulings of the lower courts.

3. Petitioners seek this writ on the additional basis of the erroneousness of the decision below. They believe that their appeal from the judgment of the trial court deserved a more thorough consideration of their position than that provided by the Sixth Circuit.

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[4] *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 73 F. 2d 333 (6th Cir. 1934) c.d. 294 U.S. 719; *Garelick, et al., v. Goerlich's, Inc. et al.*, 323 F. 2d 854 (6th Cir. 1963).

[5] *Garelick, et al. v. Goerlich's, Inc., et al., supra.*

The *per curiam* opinion below, consisting of approximately one hundred and thirty-five words, including dates and citations, concludes, "In all material respects this case is a companion case to *Garelick v. Goerlich's, Inc.*, 323 F. 2d 854 (C.A. 6, 1963), and, as the District Judge held, is controlled by it."

There seems little doubt but that the lower court could not and did not differentiate between the pleadings in this case and those of the Garelick case inasmuch as it found the latter to be controlling.

It is submitted that even a cursory reading of the pleadings discloses an essential distinction. The opinion in the Garelick case states that unsuccessful attempts by plaintiffs-appellants therein to renew business relations with defendant-appellee, although constituting overt acts, did not cause any further damage to them than that sustained by the original refusal to do busineess which took place beyond the statutory period.

Petitioners, as in the Garelick case, have alleged a conspiratorial refusal by Respondents to continue business relations. But, unlike Garelick, Petitioners allege that they took additional measures to obtain Respondents' products from third parties and were successful until Respondents combined to interfere with, impair and terminate Petitioners' contracts with such third persons to their damage.

It is such overt acts by Respondents that Petitioners claim have occurred within the statutory period, i.e., 1957, causing them damage. See R. 11, 12, 8a, 13a and 16a.

Petitioners claim that the lower court, although relying on the Garelick case for the correct rule in the Sixth Circuit respecting the statute of limitations, has manifestly misapplied it by its failure to distinguish the factual assertions between that case and this one. For a case similar

in facts to this one, wherein the court quite easily distinguished Garelick, see *Peto v. Madison Square Garden Corporation, et al.,* (S.D. N.Y. Civ. 131-72 March 11, 1965), C.C.H. Trade Regulations, Par. 71,398.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Title 15 U.S.C. Section 15b--Limitation of actions:

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections. Oct. 15, 1914, c. 323, Sec. 4B, as added July 7, 1955, c. 283, Sec. 1, 69 Stat. 283.